Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

No. 96-1874

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHARITA D. CHALMERS,
Petitioner,

v.

TULON COMPANY OF RICHMOND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should the *prima facie* test of a claim for religious discrimination be modified by eliminating the requirement that an employee inform her employer of religious needs requiring accommodation?

2. Should an employee be permitted to use her religion as a shield against the consequences of her actions where the employer had no opportunity to evaluate the possibility of accommodation?

PARTIES TO THE PROCEEDING BELOW

Petitioner: Charita D. Chalmers (Plaintiff-Appellant)

Respondent: Tulon Co. (Defendant-Appellee)

CORPORATE DISCLOSURE STATEMENT

Respondent, Tulon Co., is a wholly-owned subsidiary of Esterline Technologies Corp., a publicly held company traded on the New York Stock Exchange. No other publicly held entity has a direct financial interest in the outcome of this litigation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Tulon Co.[1], respectfully requests this Court deny the Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 16, 1997.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Virginia was stated from the bench, and a final order was entered on July 26, 1995 granting summary judgment to Tulon Co. on all counts. The decision of the United States Court of Appeals for the Fourth Circuit affirming the district court's decision was published in *Chalmers v. Tulon Company of Richmond*, 101 F.3d 1012 (4th Cir. 1996). Plaintiff-appellant's petition for

[1] Incorrectly identified throughout these proceedings as Tulon Company of Richmond.

rehearing *en banc* was denied by order filed January 16, 1997.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case because the petition was not filed within 90 days after judgment as required by Supreme Court Rule 13. Petitioner seeks review from a decision of the United States Court of Appeals for the Fourth Circuit entered on December 4, 1996. Petition for rehearing and suggestion for rehearing *en banc* was denied by order filed January 16, 1997. Accordingly, pursuant to Supreme Court Rules 9(1) and 13(1), the petition should have been filed by an attorney admitted to practice before this Court on or before April 16, 1997. The petition was not filed by such an attorney in a timely manner, and was not docketed by this Court until May 28, 1997. No extension of time for filing the petition, pursuant to Supreme Court Rule 13(5), was sought or obtained. The petition was therefore untimely, and may not properly be considered. *See* pp. 8-9 below.

STATEMENT OF THE CASE

Petitioner, Charita Chalmers, was employed by Respondent, Tulon Co. ("Tulon"), in the company's Richmond, Virginia service center ("Richmond Center") from October 1988 until September 21, 1993. *Chalmers v. Tulon Company of Richmond*, 101 F.3d 1012, 1014 (4th Cir. 1996). During Ms. Chalmers' employment, the Richmond Center employed from six to fifteen employees. *Id.*

Tulon manufactures and repoints drill bits and routers used in the printed circuit board industry. Ms. Chalmers began working for Tulon as a repoint operator, and was promoted to repoint supervisor in 1991. As repoint supervisor, Ms. Chalmers was the only management-level employee who regularly worked at the Richmond Center. Richard C. LaMantia, Ms. Chalmers' immediate supervisor, was in charge of sales throughout the eastern United States and was present at the Richmond Center only a few

days every few months. At all other times, Ms. Chalmers was the only manager at the Richmond Center. Ms. Chalmers acknowledged that it was part of her supervisory responsibility to promote harmony in the workplace and set an example for her subordinates. *Id.*

On September 6, 1993, Ms. Chalmers mailed the following letter to Mr. LaMantia at his home:

> Dear Rich,
>
> The reason I'm writing you is because the Lord wanted me to share somethings [*sic*] with you. After reading this letter you do not have to give me a call, but talk to God about everything.
>
> One thing the Lord wants you to do is get your life right with him. The bible says in Roman 10:9vs that if you confess with your mouth the Lord *Jesus* and believe in your heart that God hath raised him from the dead, thou shalt be saved. vs 10—For with the heart man believeth unto righteousness, and with the mouth confession is made unto salvation. The two verse [*sic*] are saying for you to get right with God *now*.
>
> The last thing is, you are doing somethings [*sic*] in your life that God is not please [*sic*] with and He wants you to stop. All you have to do is go to God and ask for forgiveness before it's too late.
>
> I wrote this letter at home so if you have a problem with it you can't relate it to work.
>
> I have to answer to God just like you do, so that's why I wrote you this letter. Please take heed before it's too late.
>
> In his name,
>
> Charita Chalmers

Id. at 1015.

Ms. Chalmers' letter arrived at Mr. LaMantia's home on September 10, 1993, while he was traveling on Tulon business. Ms. LaMantia's wife opened the letter in his

absence. Mrs. LaMantia interpreted the references to her husband's improper conduct as indicating that he was committing adultery. In tears, Mrs. LaMantia telephoned her husband, while he was conducting a Tulon business presentation, and accused him of infidelity. Mr. LaMantia complained to Craig A. Faber, Vice President of Administration at Tulon, about Ms. Chalmers' letter. Mr. LaMantia told Mr. Faber that the letter had caused him personal anguish, had placed a serious strain on his marriage, and that he no longer could work with Ms. Chalmers. *Id.*

While investigating Mr. LaMantia's complaint, Mr. Faber discovered that Ms. Chalmers had sent a second letter to Brenda Combs, a Tulon employee who was a direct subordinate of Ms. Chalmers. At the time Ms. Chalmers sent this letter, Ms. Combs was convalescing from an undiagnosed medical condition after giving birth out of wedlock:

> Brenda,
>
> You probably do not want to hear this at this time, but you need the Lord *Jesus* in your life right now.
>
> One thing about God, He doesn't like when people commit adultery. You know what you did is wrong, so now you need to go to God and ask for forgiveness.
>
> Let me explain something about *God*. He's a God of Love and a God of Wrath. When people sin against Him, He will allow things to happen to them or their family until they open their eyes and except [*sic*] Him. God can put a sickness on you that no doctor ever could find out what it is. I'm not saying this is what happened to you, all I'm saying is get right with God right now. Romans 10:9; 10vs says that is [*sic*] you confess with your mouth the Lord Jesus and believe in your heart that God has raised him from the dead thou shalt be saved. For with the heart man believeth unto righteousness; and with the mouth confession is made unto salvation. All I'm

> saying is you need to invite God into your heart and live a life for him and things in your life will get better.
>
> That's not saying you are not going to have problems but it's saying you have someone to go to.
>
> Please take this letter in love and be obedient to God.
>
> In his name,
>
> Charita Chalmers

Upon receiving the letter, Ms. Combs wept. Ms. Combs later told Mr. Faber she found the letter cruel because it implied that "an immoral lifestyle" had caused her illness. *Id.*

Mr. Faber consulted with other members of upper management and concluded that the letters had a negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy. Accordingly, Tulon upper management colectively decided to terminate Ms. Chalmers' employment. *Id.*

Mr. Faber arranged for Ms. Chalmers to receive a memorandum setting forth the reasons for her discharge and spoke with her from California by telephone simultaneously. The memorandum stated, in relevant part:

> We have decided to terminate your employment with Tulon Co. effective today, September 21, 1993. Our decision is based on a serious error in judgment you made in sending letters to Rich LaMantia and Brenda Combs, which criticized their personal lives and beliefs. The letters offended them, invaded their privacy, and damaged your work relationships, making it too difficult for you to continue to work here.
>
> We expect all of our employees to show good judgment, especially those in supervisory positions, such as yours. We would hope you can learn from this experience and avoid similar mistakes in the future.

Id.

Following her discharge, Ms. Chalmers filed suit in the U.S. District Court for the Eastern District of Virginia alleging that Tulon discriminated against her on the basis of her religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, when the company terminated her employment. The District Court granted summary judgment in favor of Tulon on the grounds that Ms. Chalmers failed to establish either a *prima facie* case of disparate treatment religious discrimination or a *prima facie* case of failure to accommodate religious discrimination. *Id.* at 1018. The U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's ruling on the grounds that Ms. Chalmers (1) failed to establish a *prima facie* case of failure to accommodate religious discrimination because she did not notify Tulon that her religious needs required her to send personal, disturbing letters to her coworkers and (2) even if she had established a *prima facie* case, her claim would fail because her conduct was not the type that an employer can possibly accommodate, even with notice. *Id.* at 1021. Petition for rehearing *en banc* was denied by order filed January 16, 1997. A petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit followed.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court cannot properly exercise jurisdiction over this case because the petition for writ of certiorari was not properly filed within 90 days after judgment as required by Supreme Court Rules 9 and 13. Petitioner seeks review from a decision of the United States Court of Appeals for the Fourth Circuit entered on December 4, 1996. Petition for rehearing with suggestion for rehearing *en banc* was denied by order filed January 16, 1997. Accordingly, pursuant to Rules 9 and 13, the petition should have been filed by an attorney admitted to practice before this Court no later than April 16, 1997. Petitioner's counsel of record was not admitted to practice before this Court, and the petition was not docketed by this Court

until May 28, 1997. In the absence of a timely motion and order granting additional time, the petition was untimely and may not properly be considered.

Certiorari should be denied in this case because the Circuits agree with the Fourth Circuit's holding that to make out a religious accommodation claim, a plaintiff must establish that she informed her employer of her religious needs. *See, e.g., Turpen v. Missouri K. T. R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Getz v. Pennsylvania Dep't of Public Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 221-22 (6th Cir. 1991); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). As the Fourth Circuit correctly observed, and as Petitioner herself has admitted, Petitioner did not notify Tulon *at any time* that her religion required her to write proselytizing letters to her subordinates and co-workers "criticizing them for assertedly ungodly, shameful conduct." *Chalmers*, 101 F.3d at 1020. Thus, Petitioner failed to state a *prima facie* case of religious discrimination and her case properly was dismissed.

Certiorari also should be denied because the alleged conflict among the Circuits identified by Petitioner is illusory. First, the Fourth Circuit's ruling can be reconciled with the three decisions with which Petitioner claims it is at odds. Second, the decision below is analogous to, and consistent with, those cases in which an employee engages in misconduct, and only after being disciplined, informs her employer of a religious need to engage in the misconduct. Under these circumstances, courts consistently have held that the employee failed to state a *prima facie* case of religious discrimination. *See, e.g., Johnson v. Angelica Uniform, supra*; *Spencer v. North Am. Salt Co.*, 1997 U.S. App. LEXIS 601, *7 (10th Cir. January 15, 1997).

Finally, certiorari should be denied because the interpretation of Title VII urged by Petitioner would conflict with this Court's holding in *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977). Permitting religious observers to use their religion as a shield against the consequences of workplace misconduct would result in unequal treatment of similarly situated employees and would yield a chaotic workplace. This Court already has held that Title VII does not contemplate such a result. *Id.*

REASONS FOR DENYING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE PETITION FOR WRIT OF CERTIORARI

This Court cannot properly exercise jurisdiction over this case because the petition was not filed within 90 days after judgment as required by Supreme Court Rule 13. Rule 13 provides, in relevant part:

> 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case . . . is timely when it is filed within 90 days after entry of the judgment. . .
>
> 2. The Clerk will not file any petition for writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

Sup. Ct. R. 13. Supreme Court Rule 9(1) provides that, "An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court." Sup. Ct. R. 9(1).

Petitioner seeks review from a decision of the United States Court of Appeals for the Fourth Circuit entered on December 4, 1996. *Chalmers*, 101 F.3d at 1012. Petition for rehearing with suggestion for rehearing *en banc* was denied by order filed January 16, 1997. In the absence of an extension of the time for filing as permitted by Supreme Court Rule 14, the petition should have been

filed by April 16, 1997, as required by Rule 13. Because Petitioner's counsel of record was not admitted, the petition was not properly filed by April 16, and was not docketed until May 28, 1997. It may not therefore properly be considered by this Court.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CIRCUITS AGREE THAT TO ESTABLISH A VALID RELIGIOUS ACCOMMODATION CLAIM, A PLAINTIFF MUST FIRST NOTIFY HER EMPLOYER OF HER RELIGIOUS BELIEF

A. The Circuits Concur With the Fourth Circuit's Ruling That Religious Accommodation Claims Are Analyzed Under a Two-Part Framework

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("Title VII"), makes it unlawful for an employer to discriminate against an employee due to her religion: "It shall be an unlawful employment practice for an employer . . . to discriminate . . . against any individual . . . because of such . . . individual's . . . religion . . ." 42 U.S.C. § 2000e-2(a)(1). In addition to the statute's general prohibition of religious discrimination, Title VII also imposes an affirmative duty on employers to "reasonably accommodate" the religious needs, observances, and practices of employees unless an accommodation would result in "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[2]

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[2] "The reasonable accommodation duty was incorporated into [Title VII] somewhat awkwardly, in the definition of religion. . . . Section 701(j) was added in 1972 to illuminate the meaning of religious discrimination under the statute. It provides that '[the] term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.'" *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 62 n.1 (1986).

Religious accommodation claims are analyzed under a two part framework. First the employee must establish a *prima facie* case of religious discrimination by proving that: (1) she had a bona fide religious belief, the practice of which conflicted with a job requirement; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her with or subjected her to discriminatory treatment because of her inability to fulfill the job requirement. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986) (stating that the Court of Appeals utilized the above formulation and affirming the judgment of the Court, but remanding to the District Court for additional findings); *Turpen v. Missouri K. T. R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Getz v. Pennsylvania Dep't of Public Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 221-22 (6th Cir. 1991); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). Only after the employee has established a *prima facie* case does the burden shift to the employer to show that it was unable to reasonably accommodate the employee's religious practice without undue hardship.[8] *Id.*

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[8] As grounds for this Court to grant her petition for a writ of certiorari, Petitioner alleges that the Fourth Circuit's ruling "conflicts with the decisions of other courts of appeals and with Title VII itself by failing to require the defendant to *demonstrate* that it is 'unable to reasonably accommodate to the religious practice without undue hardship on the conduct of the employer's business.' " Petition at 4. This argument is not well taken. The Circuits agree that only *after* an employee has established a *prima facie* case of religious discrimination must the employer show that it was unable to reasonably accommodate the employee's needs without undue hardship. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986)

B. The Fourth Circuit's Ruling That Petitioner Failed to State a *Prima Facie* Case of Religious Accommodation Discrimination Because She Did Not Notify Her Employer That Her Religion Required Her to Write Personal Disturbing Letters to Her Co-Workers Is Consistent With the Rulings of Other Circuits

The Fourth Circuit, below, ruled that Petitioner failed to state a claim of religious accommodation discrimination because she did not notify her employer that her religion required her to write and send accusatory letters to her co-workers at their homes:

> Chalmers has alleged that she holds bona fide religious beliefs that caused her to write the letters. Tulon offers no evidence to the contrary. The parties agree that Tulon fired Chalmers because she wrote the letters. Accordingly, Chalmers has satisfied the first and third elements of the prima facie test. However, in other equally important respects, Chalmers' accommodation claim fails.

(stating that the Court of Appeals utilized the above formulation and affirming the judgment of the Court, but remanding to the District Court for additional findings); *Turpen v. Missouri K.T.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Getz v. Pennsylvania Dep't of Public Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 221-22 (6th Cir. 1991); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). The Fourth Circuit held that Petitioner failed to establish a *prima facie* case of religious discrimination: "Chalmers cannot satisfy the second element of the *prima facie* test. She has forecast no evidence that she notified Tulon that her religious beliefs required here to send personal, disturbing letters to her co-workers." *Chalmers*, 101 F.3d at 1021. Because Petitioner did not establish a *prima facie* case of religious discrimination there was no need for the Fourth Circuit to require Respondent to "*demonstrate* that it is 'unable to reasonably accommodate to the religious practice without undue hardship on the conduct of the employer's business.'" Petition at 4.

A.

> Chalmers cannot satisfy the second element of the prima facie test. She has forecast no evidence that she notified Tulon that her religious beliefs required her to send personal, disturbing letters to her co-workers. Therefore, she did not allow the company any sort of opportunity to attempt reasonable accommodation of her beliefs.

Chalmers, 101 F.3d at 1021.

Contrary to Petitioner's assertion, the Fourth Circuit's ruling does not "create[] a different standard from that used by other Circuits" in religious accommodation cases. Petition at 3. Rather, the Circuits agree that to make out a religious accommodation claim, a plaintiff must establish that she informed her employer of her religious needs. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Missouri K. T. R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)), *aff'd on other grounds*, 479 U.S. 60, 65 (1986)); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (an employee disinterested in informing his employer of his religious needs "may forego the right to have his beliefs accommodated by his employer"); *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) (religious accommodation case requires proof that plaintiff "has informed his employer" about his religious needs); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (religious accommodation case includes a "requirement that plaintiff inform his employer of . . . his religious needs"); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) (religious accommodation plaintiff must inform his employer of his religious need); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988) (religious accommodation case requires plaintiff to inform his employer about his religious need).

As the Fourth Circuit has correctly observed, and as Petitioner herself has admitted, Petitioner did not notify

Tulon *at any time* that her religion required her to write proselytizing letters to her co-workers (one of them a subordinate) "criticizing them for assertedly ungodly, shameful conduct" nor did she otherwise notify Tulon that she held religious beliefs requiring accommodation. *Chalmers*, 101 F.3d at 1020. Thus, Petitioner clearly has failed to state a *prima facie* case of religious discrimination.

1. *The Conflict in the Circuits Alleged by Petitioner Is Illusory, as the Fourth Circuit's Decision Does Not Conflict With the Decisions of Other Circuits*

Petitioner attempts to circumvent her fatal failure to provide notice of a religious need to proselytize by challenging the Fourth Circuit's characterization of the notice requirement as an "advance notice requirement." Petition at 4-11.[4] Petitioner contests the Fourth Circuit's characterization of the notice requirement by asserting that it conflicts with the holdings in: *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995); *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S. Ct. 1042 (1996); and *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993). Petition at 4.

In *Heller v. EBB Auto Co.*, an employee, whose wife was converting from Catholicism to Judaism, wanted to take time off from work to attend his wife's conversion ceremony. 8 F.3d at 1437. Though one manager initially granted his request for time off, permission subsequently was revoked by another member of management, and the employee filed suit under Title VII. *Id.* at 1437-38. The employer sought to dismiss the action on the basis that,

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[4] The Fourth Circuit stated: "In sum, Chalmers has not pointed to any evidence that she gave Tulon—either directly or indirectly—advance notice of her need for accommodation. For this reason, Chalmers has failed to establish a *prima facie* case of discrimination under the religious accommodation theory." 101 F.3d at 1021.

inter alia, "Heller never explained [to his employer] the nature of the ceremony." *Id.* at 1439.

With respect to the *substance* of the notice required, *not* the time at which notice was given, the *Heller* court stated: "A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Id.* In *Heller*, the Ninth Circuit held that the employee's notice was satisfactory under Title VII because, contrary to the instant case, the employer had been told that Heller was Jewish and that his wife was studying for conversion before Heller requested time off. Moreover, when Heller requested the time off, "he informed [the employer] why he needed to miss work." *Id.*

Consistent with the Fourth Circuit, below, and other cases addressing this issue, the *Heller* court emphasized that to be protected by Title VII a plaintiff must notify her employer of her religious belief. *Id.* at 1438. Unlike the plaintiff in *Heller*, Petitioner —did not notify Tulon *at any time* of her religious need to proselytize. Accordingly, contrary to Petitioner's assertion, the Fourth Circuit's holding in the instant case is not inconsistent with the holding in *Heller*.

Petitioner also inexplicably maintains that the Fourth Circuit's characterization of the notice requirement conflicts with the holding in *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995). Petition at 4. In *Wilson*, the employer asked the plaintiff to cover a graphic anti-abortion button she wore while at work. *Id.* at 1338. The plaintiff refused, and the employer ultimately fired her. On appeal, the Eighth Circuit considered only whether the employee's religious beliefs were sincerely held and whether the employer's proposed accommodation was reasonable; not whether or when the plaintiff notified the employer of a religious need to wear the pin. *Id.*

Given that the *Wilson* court did not contemplate the issue of notice, it is not possible for the Fourth Circuit's characterization of the notice requirement to be incompatible with the Eighth Circuit's ruling.

Finally, Petitioner alleges that the Fourth Circuit's characterization of the notice requirement is inconsistent with the Eighth Circuit's holding in *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996). In *Brown*, the plaintiff, a born-again Christian, was the director of the data processing department for Polk County, Iowa. 61 F.3d 650, 652 (8th Cir. 1995). An internal investigation into religious activities conducted on government time revealed that Brown directed a secretary to type Bible study notes for him, said prayers with other employees in his office, and quoted Bible passages in the workplace. Brown was reprimanded by Polk County for engaging in religious conduct in the workplace. Subsequently, on another occasion, Brown was asked to remove religious items from his office. Several months later, Brown was discharged after an internal investigation into personal use of county computers by employees. Brown sued the county for religious discrimination. *Id.* at 652-54.

The *Brown* case is inapposite to the Fourth Circuit's characterization of the notice requirement for multiple reasons. First, because the *Brown* case involved Polk County, a public employer, the Eighth Circuit heeded both the First Amendment and Title VII in determining the legitimacy of the employer's actions. *Id.* In contrast, Tulon is a private employer not subject to the constraints of the First Amendment. Second, at issue in the *Brown* case was whether the plaintiff's failure to *request an accommodation* for his religious conduct precluded him from bringing a religious discrimination claim under Title VII. *Id.* The Eighth Circuit did not address whether the employee was obliged to notify his employer in advance of a religious need to engage in seditious conduct. Moreover, the *Brown* court's holding was that, under the particular cir-

cumstances of that case, the employer was aware of the plaintiff's need for an accommodation. *Id.* The Eighth Circuit did not rule, as Petitioner suggests, that an employee is under no obligation to notify her employer prior to engaging in religiously-motivated misconduct.

Accordingly, the conflict in the Circuits alleged by Petitioner is illusory. Each of the cases cited in the Petition can be reconciled with the Fourth Circuit's ruling. Indeed, the EEOC's own *Guidelines on Discrimination Because of Religion* support the Fourth Circuit's holding that a plaintiff must notify her employer of her religious needs before the employer is required to undertake a reasonable accommodation: "(c) Reasonable Accommodation (1) *After* an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer has an obligation to reasonably accommodate the individual's religious practices." 29 C.F.R. § 1605.2 (c)(1) (emphasis added).

Even assuming, *arguendo*, that the Fourth Circuit's characterization of the notice requirement is incorrect, the fact remains that, despite her cognizance of the potential workplace disruption which likely would result from her conduct, Petitioner *at no time* notified Tulon that her religion required her to write accusatory proselytizing letters to her co-workers. Because Tulon was never notified of Petitioner's religious needs, Petitioner has failed to state a *prima facie* case of religious discrimination and the Fourth Circuit's holding is correct.

2. *The Instant Case Is Analogous to, and Consistent With, Cases in Which an Employee Engages in Misconduct, and Only After Being Disciplined, Notifies the Employer of Her Religious Need to Engage in the Misconduct*

When an employee engages in misconduct resulting in discipline and only then informs her employer that she had a religious need to engage in the conduct at issue, courts consistently have held that the employee has failed

to state a *prima facie* case of religious discrimination. It is the notice to the employer that triggers the employer's duty to seek a means of accommodation, for only when an employer has advance notice of a conflict between religious needs and the employment requirements is it possible for an employer to attempt to accommodate those needs.

For example, in *Johnson v. Angelica Uniform Group, Inc.*, a plaintiff who failed to notify her employer in advance of her religious need to miss work was not entitled to bring a religious discrimination claim against her employer. 762 F.2d 671, 673 (8th Cir. 1985). In *Johnson*, the plaintiff wrote a letter to her employer stating she would be absent from work from October 11 through October 24 for religious purposes. The employer did not receive Johnson's letter until October 13, after it had terminated her employmnet for unexcused absence. *Id.*

As in the instant case, Johnson's failure to notify her employer in advance of her religious needs deprived the employer of an opportunity to attempt accommodation. The Eighth Circuit held that she failed to satisfy the notice requireemnt of a *prima facie* case of religious discrimination:

> Johnson clearly did not satisfy the notice element of the *prima facie* requirements. Had Johnson informed [her employer of her religious needs] at least prior to her absences for religious purposes, her employer would have had the chance . . . to work out an arrangement . . . Because Johnson failed to give the required notice, it is clear that her termination was due to excessive absenteeism and not because of a conflict between an employment requirement and her religious faith.

Id. at 673.

Similarly, in *Spencer v. North American Salt Company*, the Tenth Circuit recently upheld summary judgment in favor of the employer where an employee failed to notify

the employer of his religious objection to a workplace rule. 1997 U.S. App. LEXIS 601, *7 (10th Cir. January 15, 1997). In *Spencer*, the employee, a member of the Faith Apostolic Tabernacle Church, required medical attention to remove foreign particles from his eye on four occasions. After his fourth injury Spencer was required by his employer to wear safety glasses in the workplace. After being observed three times without safety glasses, Spencer was discharged, and filed a charge of religious discrimination. *Id.* at *3-4.

As in the instant case, Spencer's charge of discrimination was the first time he asserted a religious belief was behind his misconduct. *Id.* at *7. On appeal, the Tenth Circuit upheld the district court's grant of summary judgment in favor of the employer:

> Mr. Spencer argues that the goggle requirement was absurd and therefore contrary to his religious duty to secure rightfulness, truth and order. However, Mr. Spencer failed to show that he informed the company of a connection between his religious beliefs and his failure to wear goggles during the work day. The district court properly entered summary judgment on the religious discrimination claim.

Id.

In *Cary v. Carmichael*, an employee who did not notify his employer of his religious objection to a mandatory drug test also failed to state a *prima facie* case of religious discrimination. 908 F. Supp. 1334, 1342 (E.D. Va. 1995). The *Cary* court found that Cary provided only "the vaguest descriptions of a religious objection" and concluded, "[S]urely [the] plaintiff must be required to put forth more to the employer before the employer can fairly be found to have notice of a *bona fide* religious objection." *Id.* at 1344. The notice requirement, according to *Cary*, "goes directly to the heart of the statute," and "if an employer has not been given adequate notice of an employee's religious conflict, then *ipso facto* the

religious animus that the statute was designed to prevent cannot have existed." *Id.*

The *Cary* court described the purpose of the notice requirement as follows:

> Without notice, an employer cannot be found to have acted "because of" the religious conflict. . . It stands to reason then, that a discharge of an employee for failure to comply with valid employment requirements, where the employer does not have sufficient knowledge of an employee's religious beliefs or practice despite the fact that the employer knows that a conflict has arisen, cannot be held to violate the statute.

Id. at 1345-46. As in the instant case, Cary's failure to properly notify his employer of his religious beliefs "preclude[d] any finding that [he] was fired because of his religious beliefs." *Id.*

In *EEOC v. J.P. Stevens and Co.*, an employee discharged for failing to notify his employer in advance of a religious need not to work on Sunday also failed to establish a *prima facie* case of religious discrimination. 740 F. Supp. 1135, 1136 (E.D.N.C. 1990). In *J.P. Stevens,* the employer frequently required employees to work on Sundays. Any employee who did not wish to work on Sunday was required to find his own replacement by utilizing a "swap system" or he would receive an unexcused absence. *Id.* at 1137. One employee, Mr. Dial, a member of the "Holiness" religious sect, believed that working on Sundays was a violation of his religious tenets. *Id.* at 1136. Mr. Dial also believed that it was a sin to recruit someone else to work in his stead. Mr. Dial did not inform his employer of his religious needs, and, ultimately, the employer discharged him for excessive, unexcused absence. At trial, the District Court held that Mr. Dial could not state a *prima facie* case of religious discrimination because he did not inform his employer of his religious needs. *Id.* at 1137.

The instant case plainly is analogous to *Johnson, Spencer, Cary,* and *J.P. Stevens,* wherein employees engaged in misconduct, and only after being disciplined, notified their employers of their religious need to engage in the misconduct. In each of those cases, as in the instant case, the courts ruled that the plaintiff had failed to satisfy the notice requirement of a *prima facie* case of religious discrimination. Because Petitioner "forecast no evidence that she notified Tulon that her religious needs required her to send personal, disturbing letters" to her subordinates and co-workers, the Fourth Circuit correctly held, consistent with other Circuits, that her religious accommodation claim must fail.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IN *TRANS WORLD AIRLINES v. HARDISON* THIS COURT REJECTED THE NOTION THAT RELIGIOUS OBSERVERS ARE ENTITLED TO EXEMPTION FROM WORKPLACE RULES

The petition for writ of certiorari should be denied because the ruling sought by Petitioner conflicts with this Court's holding in *Trans World Airlines v. Hardison,* 432 U.S. 63, 81 (1977). Petitioner's interpretation of Title VII would permit employees to use religion as a shield for the consequences of their misconduct, resulting in unequal treatment of similarly situated employees and yielding a chaotic workplace. If this Court adopts Petitioner's view, employers will be forced to tolerate unanticipated misconduct by religious observers while non-religious employees will be disciplined or discharged for engaging in identical conduct. Such a result was rejected in *Trans World Airlines v. Hardison* wherein this Court held that "Title VII does not contemplate such unequal treatment." 432 U.S. 63, 81 (1977).

This is not a case in which an unwitting employee was disciplined for engaging in innocuous conduct of a re-

ligious nature. To the contrary, Petitioner knowingly engaged in conduct that was inconsistent with her job duties. Petitioner conceded that it was part of her supervisory responsibility to promote harmony in the workplace and set an example for her subordinates, yet the letters tacitly acknowledge her cognizance of potential damage to relations with Mr. LaMantia and Ms. Combs. For example, in her letter to Mr. LaMantia Petitioner wrote: "I wrote this letter at home so if you have a problem with it you can't relate it to work." Similarly, in her letter to Ms. Combs Petitioner wrote: "You probably do not want to hear this at this time." *Chalmers*, 101 F.3d at 1015.

Dissemination of accusatory, disturbing letters to subordinates and co-workers which result in disruption of the workplace is misconduct sufficient to warrant discharge of any supervisor, regardless of their religious needs. Employers must be permitted to discipline a member of management who engages in such conduct, irrespective of religious motivation, or the workplace will become chaotic and unmanageable. While it is clear that Title VII protects an individual's status as a religious observer, it is equally clear that a company need not tolerate misconduct on the job.

To impose liability against an employer who discharges a supervisor under the circumstances present in this case would indirectly but unmistakably undermine the spirit of Title VII. Congress intended Title VII to put religious persons on equal footing with other employees in regard to employment decisions. As this Court has recognized, however, the statute was not intended to create a right to preferential treatment:

> The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against

> majorities as well as minorities. (Citation omitted) Indeed, the foundation of Hardison's claim is that TWA and IAM engaged in religious discrimination in violation of 703(a)(1) when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 81.

This Court should not, in its effort to protect the rights of one group of individuals, lose sight of the rights of others. As the Eighth Circuit observed with respect to an employee who claimed his religion entitled him to violate a workplace rule:

> [Plaintiff's] discharge stemmed from his knowing violation of company rules pertaining to company property. That [Plaintiff]'s religion somehow made him feel justified in violating a rule on corporate property simply does not suffice to imbue [the employer]'s action in discharging him with religious animus. [Plaintiff]'s discharge was caused by his violation of company rules of conduct. It was not the result of antagonism by [the employer] to his religious beliefs and did not violate Title VII.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (5th Cir. 1977), *cert. denied*, 434 U.S. 1039.

If this Court grants certiorari, religious observers will perceive immunity from workplace rules. Accepting Petitioner's view of Title VII would say to a religious observer: "because your religious needs required you to engage in misconduct, we will lighten the sanction by letting you keep your job in circumstances where anyone else who engaged in the same behavior would lose it." *See, e.g., Despears v. Milwaukee County*, 63 F.3d 635,

637 (7th Cir. 1995); *Maddox v. University of Tenn.*, 62 F.3d 843, 848 (6th Cir. 1995); *Landefeld v. Marion General Hospital*, 2 Am. Disabilities Cas. (BNA) 900 (6th Cir. 1995); *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995); *Crawford v. Runyon*, 3 Am. Disabilities Cas. (BNA) 1326 (8th Cir. 1994); and *Collings v. Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 711 (1996) (all rejecting the notion that the disabled are privileged to engage in workplace misconduct by virtue of their disability).

It is true that employers are required to provide reasonable accommodation to the known religious beliefs of an employee. However, it is not a reasonably required accommodation for an employer to overlook disruptive workplace behavior. The refusal to excuse, or even alleviate the punishment of a religious individual who engages in misconduct of the sort present here is not discrimination against that individual on the basis of her religion; it is a refusal to discriminate in her favor. This Court already has held that: "Title VII does not contemplate such unequal treatment." *Hardison*, 432 U.S. at 81.

CONCLUSION

For the foregoing reasons, Tulon respectfully requests that this Court deny certiorari in this case.

Respectfully submitted,

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June 27, 1997

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-3087

DONALD E. SPENCER,
Plaintiff-Appellant,
v.
NORTH AMERICAN SALT COMPANY, CHUCK NICHOLS, JOEL DAVENPORT AND BURL DOCKUM,
Defendants-Appellees.

January 15, 1997, Filed

Before EBEL and HENRY, Circuit Judges, and DOWNES,* District Judge.

OPINION

BY: ROBERT H. HENRY

ORDER AND JUDGMENT **

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

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* Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appearing pro se, Donald E. Spencer appeals the district court's order entering summary judgment in favor of his former employer, North American Salt Company, and individual managers, Chuck Nichols, Joel Davenport and Burl Dockum,[1] on his claims of religious discrimination and retaliatory discharge. Mr. Spencer also contends that the district court erred in assessing costs against him. Upon consideration of the record and the parties' written arguments, we affirm.

BACKGROUND

Mr. Spencer, a member of the Faith Apostolic Tabernacle Church, was employed by the company as an engine room operator and general laborer until his discharge on June 12, 1992. On four occasions between July 1991 and January 1992, Mr. Spencer needed medical attention to remove a foreign particle from his left eye. After the fourth injury, the company told Mr. Spencer that he must take the additional precaution of wearing goggles over his safety glasses at all times during the work day or be subject to disciplinary action, including suspension and discharge.

On April 8 and April 29, 1992, Mr. Spencer was observed without goggles and warned in writing that he would be discharged if it happened again. When he was observed without goggles on June 12, he was discharged.

Interspersed with the company's disciplinary measures were Mr. Spencer's contacts with federal and state agen-

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[1] This order and judgment refers to all appellees, including Mr. Dockum (Mr. Spencer's immediate supervisor), Mr. Davenport (the production manager) and Mr. Nichols (the plant manager) as "the company."

cies: (1) a claim for medical expenses related to the fourth eye injury, filed with the Kansas Department of Human Resources, Division of Workers' Compensation on April 15; (2) charges alleging asbestos exposure and unsafe personal protective equipment, filed with the Occupational Safety and Health Administration (OSHA) on April 30 and May 4 and later referred to the Mine Safety and Health Administration (MSHA); and (3) a complaint about a company policy that allegedly required him to work ten minutes a day without compensation, filed with the Wage and Hour Division of the United States Department of Labor on May 7. After his termination, Mr. Spencer filed a charge of religious discrimination with the Equal Employment Opportunity Commission (EEOC) and the Kansas Human Rights Commission (KHRC).

The company decided to pay the workers' compensation claim for medical expenses associated with the fourth eye injury. Mr. Spencer had no success with the remainder of his administrative charges.[2]

Mr. Spencer filed a complaint in the Kansas state courts alleging retaliatory and discriminatory discharge. The company removed the action to federal court; conducted discovery, including a lengthy deposition of Mr. Spencer; and moved for summary judgment. The district court granted the company's motion and awarded costs in the amount of $3,397.62.

DISCUSSION

The district court liberally construed Mr. Spencer's pleadings and identified the following claims: (1) religious

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[2] The MSHA determined that there was no asbestos or equipment hazard and the EEOC and the KHRC found no probable cause to support the religious discrimination claim. The record does not reflect the outcome of the wage and hour claim.

[3] Mr. Spencer's deposition took place from December 6th to 8th, 1994 and on January 31st, 1995.

discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); (2) retaliatory discharge in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3); and (3) common law retaliatory discharge in violation of Kansas public policy.

The court analyzed each of the claims according to the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), then entered summary judgment in favor of the company. The court found that Mr. Spencer had failed to make a prima facie showing on any claim, in that he had not come forward with evidence to support an inference of either religious discrimination or a causal connection between his discharge and his administrative filings. Alternatively, it determined that the company had articulated a legitimate reason for the discharge and that Mr. Spencer had not introduced evidence of pretext.

On appeal, Mr. Spencer argues that the entry of summary judgment was erroneous because the motivation for his termination was an issue of material fact that precluded summary judgment. We review de novo the grant or denial of a summary judgment motion, applying the same legal standard as the district court. *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 327 (10th Cir.), cert denied, 135 L. Ed. 2d 1071, 116 S. Ct. 2552 (1996). Summary judgment is appropriate only if there are no genuinely disputed material issues of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P 56(c).

As Mr. Spencer is making a Title VII claim of religious discrimination, he must establish a prima facie case by proving: "1) he . . . has a bona fide religious belief that conflicts with an employment requirement; (2) he . . . informed the employer of this belief; [and] (3) he . . . was [fired] for failure to comply with the conflicting

employment requirement." *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989).

Mr. Spencer argues that the goggle requirement was absurd and therefore contrary to his religious duty to secure rightfulness, truth and order. However, Mr. Spencer failed to show that he informed the company of a connection between his religious beliefs and his failure to wear goggles during the work day. The district court properly entered summary judgment on the religious discrimination claim.

Similarly, Mr. Spencer produced no facts in support of his contention that he was discharged in retaliation for complaining to administrative agencies. The relevant legal theories are retaliatory discharge under § 215(a) of the FLSA for the report of an alleged wage and hour violation and under Kansas common law for the workers' compensation claim and OSHA/MSHA charges.

The applicable standards are similar for both theories. The Tenth Circuit applies a "motivating factor" analysis to claims of retaliatory discharge under § 215(a). A discharge is unlawful "only if it would not have occurred but for the retaliatory intent." *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1483 (10th Cir. 1996), quoting *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992). In a Kansas common law action for retaliatory discharge, the plaintiff must establish by a "preponderance of the evidence," which is "clear and convincing in nature, that the defendant, among other things, terminated him or her in retaliation for filing a claim under the Workers' Compensation Act. *Ortega v. IBP, Inc.*, 255 Kan. 513, 874 P.2d 1188, 1196, 1198 (Kan. 1994).

The district court decided that Mr. Spencer failed to create an evidentiary dispute on the related issues of causation and pretext. We agree. The facts alleged by Mr. Spencer provide no inference of a causal connection between his agency filings and his subsequent discharge.

The uncontroverted evidence demonstrates that Mr. Spencer was discharged for his third breach of the goggle requirement. When an employee fails to come forward with sufficient evidence to raise a genuine dispute on an essential element of a retaliatory discharge claim or the employer's intent, the district court may properly grant an employer's motion for summary judgment. See *Koopman v. Water Dist. No. 1*, 972 F.2d 1160, 1164 (10th Cir. 1992).

Mr. Spencer's final contention on appeal is that the clerk of the district court's award of costs to the company was erroneous. See Fed. R. Civ. P. 54(d)(1). He specifically objects to the assessment of $2,938.40 for transcripts of his three-and-a-half days of deposition testimony.

The award of costs is affirmed for two reasons. First, Mr. Spencer failed to preserve the alleged error by requesting judicial review of the action of the clerk. See Fed. R. Civ. P. 54(d)(1). Second, we review an award of costs only for abuse of discretion. See *Treff v. Galetka*, 74 F.3d 191, 197 (10th Cir. 1996). A trial court may tax as costs the "fees of a court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Although the four volumes of deposition transcripts seem to represent "piling on," and probably were not necessary to the company's summary judgment motion, we cannot conclude that the award of costs amounted to an abuse of discretion.

The judgment of the United States District Court for the District of Kansas is AFFIRMED. We exercise our discretion to require the parties to pay their own costs and expenses on appeal. The mandate shall issue forthwith.

Entered for the Court

Robert H. Henry

Circuit Judge